No. 13,061

IN THE

United States Court of Appeals

For the Ninth Circuit

EDMUND E. SUNDWALL,
Libelant-Appellant,

vs.

PACIFIC FAR EAST LINE, INC. (a corporation), Sued herein as Pacific Far East Steamship Company,
Respondent-Appellee.

BRIEF FOR RESPONDENT-APPELLEE

On Appeal from the United States District Court for the Northern District of California, Southern Division.

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STATEMENT

On the 28th day of April, 1949, Edmund Sundwall, a 57 year old seaman, was directed by the boatswain to remove material, described as oil, from a drum which was stowed on the after deck and to use the material to paint certain iron parts of the vessel. Sundwall proceeded, with two other seamen, to unlash the drum and to pour the oil from it

into a five-gallon paint bucket. The two bungs on the top of the drum were first opened up so that the oil would run out the lower bung and air would enter through the upper. Sundwall held the bail of the paint bucket with his left hand and placed his right hand under the bottom. When the bucket had filled up to a depth of about three feet (Sundwall, Ap. p. 37) some of the oil splashed on Sundwall's face and a few drops got into his left eye (Sundwall, Ap. p. 38).

After the accident Sundwall took the bucket to the location on the vessel where he was to do the painting and then went below and washed out his eye with some warm water. Later on—the exact interval of time does not appear except that meantime he had completed his watch and was taking a shower—he again washed out the eye. A few days later—the report of personal injury made out by the purser indicates that it was six days later—he went to the purser for treatment of his eye and was given some kind of an eye wash to use. Meantime he had stood his regular watches which included standing lookout forward on the vessel and the wheel watch on the bridge which involved looking at the vessel's compass. When he went to the purser it seems that the eye had commenced to cloud up. He was sent ashore at the first port of call for examination and later was returned to the United States Marine Hospital at San Francisco by airplane.

It is alleged in the libel that appellee "so negligently and carelessly maintained, managed and controlled said vessel as to cause oil, which libellant was then and there engaged in transferring from a drum to a five-gallon can, to splash upon and enter libellant's left eye * * *."

In a second cause of action it is alleged that the vessel was unseaworthy because of failure to provide pumps for the transfer of oil from an oil drum to a five-gallon can.

As the foregoing indicates, the operation during the course of which Sundwall got a few drops of oil in his left eye was a very simple one, and the question presented is whether it was negligence on the part of appellee to direct appellant to do such a simple operation without providing him with a pump for his use in doing so. The question of whether or not there was negligence or whether the vessel was unseaworthy in this case would appear to be the same.

ARGUMENT

It Was Not Negligence on the Part of Appellee's Boatswain to Direct Sundwall and Two Other Seamen to Remove Oil from a Fifty-Gallon Drum and Place It in a Five-Gallon Paint Bucket Without First Providing These Seamen with a Hand Pump; Neither Did the Absence of a Hand Pump Render the Vessel Unseaworthy.

It is firmly established that a ship operator is not required to use the best and safest appliances and the failure to provide them is not negligence and does not render the vessel unseaworthy. This court has so held in *The Baymead,* 88 F.(2d) 144, saying:

> "The shipowner is not obliged to furnish the best possible accommodations or equipment for his crew."

As stated above, the job being performed by Sundwall and his fellow seamen was a very simple one. In general it is the kind of a job which any person in almost any walk of life, such as a farmer, garageman or painter, etc., would do and would do in the same way that the men on the vessel were doing it. It merely involved pouring a liquid out of a

larger container into a smaller one, and tipping the larger over to accomplish that.

The drum was of the kind commonly used for gasoline, oil, and other similar material. It was made of iron, was about forty inches high and twenty-eight inches in diameter, and was commonly called a fifty-gallon drum (Brunsch, Ap. pp. 110, 111). The bucket was of a kind commonly used for the purpose for which it was being used, i.e., to carry material by hand such as oil, paint, etc., about the ship.

As might well be anticipated this is not the kind of case which presents an issue which would be frequently litigated. However, a case basically the same was decided by this court in favor of the ship in the case of *The Baymead,* cited above. It was there contended by the libelant that the vessel was unseaworthy because steps, which the seaman was required to use, were too steep, worn and provided with only a single hand rail. This court affirmed the ruling of the trial court that the vessel was not unseaworthy. The court was of the view that if there was hazard in connection with the use of the stairway, that the libelant should have used a different method of descending the steps (gone down backwards instead of forwards). The court there said:

> "With reference to the ladder being too nearly vertical so that the steps provided an insecure foothold to the seamen going down the ladder facing away from the steps, it is sufficient to say that the position of the ladder was well known to the appellant who used it daily and that if in his judgment there was insufficient foothold provided by the steps while facing forward, there is no good reason he should not have turned about and faced the ladder, thus getting a more perfect foothold in order to come down the ladder."

Cases which are persuasive are the following:

In *Hanrahan v. Pacific Transport Co.,* 262 Fed. 951 (C.C.A. 2), it was held that the ship was not unseaworthy because a railing was temporarily not in place where a seaman fell overboard. The court said:

> "* * * and to say that this ship was unseaworthy because she had no handrail up, while lying alongside a wharf discharging cargo, is merely untrue."

The court indicated that a ship need only be reasonably safe, not absolutely safe. Certiorari was denied by the Supreme Court; 252 U.S. 579.

A similar ruling was made in the case of *Adams v. Bortz,* 279 Fed. 521 (C.C.A. 2). See also: *In Re Tonawanda Iron & Steel Co.,* 234 Fed. 198, where the court held that the ship was not obligated to use the most modern appliances; and *The Santa Clara,* 206 Fed. 179, where there was not any hand rail around a hatch.

The case of *Biles v. United States,* 1949 A.M.C. 875, is very much in point. There the shipowner furnished a thirty-five foot carpenter's ladder as the means of boarding and leaving the vessel. Libelant fell while coming aboard. The court found that the vessel was not unseaworthy and stated that a ship owner is not required to furnish the best possible means but only that which is *reasonably* fit and *reasonably* safe for the purpose used. Citing the *Baymead.* The court also found the libelant fell because of the manner in which he was using the ladder.

Mr. Walter E. Brunsch, who was mate on the vessel but not in the employ of appellee, Pacific Far East Line, at the time of the trial, testified that in all his years of service on board cargo ships, he had never seen a hand pump used

for such a job as was done by the seamen in this case. Mr. Brunsch started serving in the forecastle and worked his way up to be a Master Mariner. He held that license when he was a witness. Libelant-appellant's brief indicates there has been some misapprehension in regard to the testimony of this witness. His testimony was in fact that he had never seen a hand pump used by the deck department except where the material had to be pumped to a *higher level.* To do that the deck department of a vessel would sometimes borrow a pump from the engineers. His testimony, given under cross-examination in that regard follows:

"Q. In your experience does the deck department ever borrow a hand pump from the engine department?

A. Yes.

Q. For what purpose would the deck department borrow such a pump?

A. To transfer coal oil *up* into the coal oil storage tank or your paint thinner." (Brunsch, Ap. p. 114)

* * * * * * *

"Q. When you transfer paint thinner from fifty-gallon drums is there any reason why you need a hand pump?

A. *Because we would put it into a tank that is above the deck level."* (Italics supplied.) (Brunsch, Ap. p. 115)

* * * * * * *

"Q. As a matter of fact, you use these hand pumps frequently to transfer liquid from fifty-gallon drums whether it is to be transferred to above the deck level or not?

A. Are you asking me or telling me?

Q. I am asking you?

A. No.

Q. As a matter of fact, that is common practice aboard American merchant ships to transfer liquids out of fifty-gallon drums, isn't that a fact?

A. Not to my knowledge." (Brunsch, Ap. p. 116)

He had previously testified that he had never seen a hand pump used to transfer diesel oil from fifty-gallon drums (Brunsch, Ap. p. 115).

He further testified:

"Q. What is the process ordinarily used to transfer the paint from the large fifty or fifty-five gallon drum to the five-gallon paint pot?

A. Open up the air bung and the bigger bung and tilt it over into your pot that is standing underneath." (Brunsch, Ap. p. 109)

In response to questions by the court, this witness testified:

"Q. How many men does it require in an operation of that kind?

A. Usually two men to handle the drum and one to handle the bucket.

Q. That is, two men to tilt the drum?

A. One gets on each side and they tilt the drum, and the other fellow puts the bucket so you don't lose your material." (Brunsch, Ap. p. 110)

It should be added that this witness, when asked as to how many cargo ships he had served on during the course of his many years at sea, replied "Probably two or three hundred." (Brunsch, Ap. p. 111)

There is some hazard connected with almost every job done on board a ship, or in fact, any other place. But

there is no apparent reason why this simple job should not have been accomplished without anything happening which would cause injury.

It would seem that there was no necessity for Sundwall's holding the bucket the way he did hold it. He must have held it very close to his face because he had his right hand under the bottom of the bucket, which was a few feet (about 2½) in depth (Sundwall, Ap. p. 59), while holding the bail with his left hand (Sundwall, Ap. p. 61). There appears to be no reason why it should have been anticipated that he would do his part of the job that way. His conduct in that regard is comparable to the conduct of the libelant in the *Baymead* case, and also in the case of *Biles v. United States,* supra. In each of those cases it was solely the fault of the injured seaman that caused the mishap. The same is true in our case; or if it may be said libelant was not negligent, that the mishap was due to pure accident. Certainly there was nothing unusual or unsafe about either the drum or the paint bucket; and the same may be said about the tipping of a drum and the pouring of oil into a bucket.

What the court said in the Hanrahan case, supra, may be said in this case. It is "merely untrue" to say that failure to supply a hand pump rendered the vessel unseaworthy.

The trial judge who heard the oral testimony of both witnesses who testified as to the circumstances and the practice on board vessels found that the practice was in accordance with the testimony of the mate, Brunsch, and contrary to that of libelant. The court's finding was:

> "The libelant did not prove that it was the custom or practice to provide a pump to remove oil from iron drums on the decks of such vessels." (Ap. p. 13)

The court also found that the vessel was not unseaworthy and the respondent not negligent (Ap. pp. 13, 14).

The court further found that any injury to libelant's left eye was either a simple accident or was due solely to libelant's own negligence in holding his face close to the bucket (Ap. p. 15).

The burden of proof is always on the complaining party, and for aught that appears in the record, it might well have been, at least libelant has not proved the contrary, that if a hand pump had been used, any hazard of splashing would have been present just the same.

For reasons which the foregoing indicates, it seems plain that the court was amply justified in finding that there was a failure of proof on libelant's part in respect to the allegation of negligence and also the allegation of unseaworthiness; and in dismissing the libel.

It may be added, although it would seem unnecessary, that it is established law in this circuit, as well as elsewhere, that the findings of the trial court will not be disturbed unless manifestly wrong, and that this is particularly true in those cases where the trial judge has the advantage of hearing the testimony of the witnesses in open court.

See: *Lillig v. Union Sulphur Co.,* 87 F.(2d) 277 (C.C.A. 9). In that case the trial court found that the injuries, although of a very serious nature, were not attributable in any way to *negligence* on the part of the respondent. This Court affirmed, saying:

> "* * * the findings are entitled to great weight and should not be upset, except for manifest error or unless it is shown that they are clearly wrong."

There a carpenter's ladder which libelant was using to paint a ventilator while the vessel was at sea slipped, causing libelant to either fall with the ladder or from it.

See also: *Drain v. Shipowners and Merchants Tug Boat Co.,* 149 F.(2d) 845 (C.C.A. 9). In that case the trial court found that the owners were not *unskillful* or *negligent* in the instructions to the seaman, which finding, among others, was affirmed by this court. Reference was made to the well established rule that the trial court would not be reversed as to its findings unless clearly against the preponderance of the evidence. This court there said that all assignments or error at the hearing of the appeal were waived "except that embodying the main and controlling controversy as to whether on the evidence in the apostles it is established that libelee was *neglectful* of its duties towards the libelant, Drain, as its ordinary seaman, or whether his injury *had its sole cause in his own want of care* for his own safety in a place of danger." (Emphasis supplied.) This court affirmed the finding of the trial court.

It hardly seems necessary to say more than a few words in regard to the authorities cited by appellant. A case quoted from and apparently principally relied on is *Mahnich v. Southern Steamship Company,* 321 U.S. 96, where petitioner fell from a staging and was injured. He was caused to fall because a rope used in rigging the staging was defective, and *actually carried away.* There was no question but that an unsafe piece of equipment was used. The only question presented was whether the fact that a good rope was on board and could have been used by the mate made the vessel seaworthy. The court held that it did not. It may be added that examination of the rope after the accident showed that it was so rotten as to be inade-

quate to support the strain imposed upon it. It is of interest that even in such a case two justices, Mr. Justice Roberts and Mr. Justice Frankfurter, dissented.

Appellant seems to have placed considerable reliance also upon the case of *Armit v. Loveland,* 115 F.(2d) 308, where it was charged that it was negligence on the part of the operator of the vessel to fail to provide splash plates about the engine which would have prevented oil being thrown on steps which the libelant, engineer, was obliged to use during very bad weather when the vessel was rolling and pitching. The case was tried before a jury and, of course, if there was any substantial evidence which would justify the jury's verdict, the appellate court would be bound by it. Further, the absence of splash plates obviously created a very unsafe condition and this was particularly so because the accident happened during very heavy weather. It, of course, was to be anticipated that a vessel might well encounter heavy weather while at sea. The case is therefore easily distinguishable.

There was a sharp issue in the instant case, as the record abundantly shows, as to whether the few drops of oil which splashed in appellant's left eye were the cause of subsequent diminution in the sight of that eye. The trial court, however, did not make any finding in that regard as it was not required to, finding, as it did, that there was not any unseaworthiness or fault. Appellant has seen fit, however, to discuss that issue and we shall therefore make a very brief reply and quote pertinent excerpts from the testimony, but merely for the purpose of bringing a more accurate and complete picture before the court.

When Sundwall joined the Iran Victory he was to all practical purposes totally blind in his right eye (Dr. Boyle, Ap. pp. 118, 122). He denied that he had knowledge of that although that appears wholly incredible (Sundwall, Ap. p. 33). And the vision in his left eye was substantially impaired. He had a heavy scar at 11 o'clock on the cornea of his left eye and the vision when examination was made in November, 1948, was 20/80. When he returned to the United States Marine Hospital, and after one or more operations had been performed on his left eye (and one on the right eye), the vision in the left eye was 20/200. It may be added that the Marine Hospital records show that there were lens opacities in his left eye shortly before he joined the Iran Victory in the spring of 1949 (Dr. Boyle, Ap. p. 141; Dr. Bricca, Ap. pp. 72, 93). The records of the United States Marine Hospital at San Francisco also reveal inflammation of the left eye from time to time over a period of years. Neither the doctor who was called by the libelant nor the one called by respondent could say for certain what caused the increased impairment of Sundwall's vision. However, Dr. Boyle who had been associated with Dr. Otto Barken for some twenty years, was of the opinion that the force of a few drops of oil striking the cornea, which is a tough membrane about equal to the skin on the back of one's hand, would not cause physical damage (Dr. Boyle, Ap. p. 120). As to whether it would cause an irritation which would set up an inflammation is problematical but was in Dr. Boyle's opinion quite unlikely because Sundwall washed the oil out immediately and continued to stand lookout for at least two days following the accident which required a usable left eye, i.e., one with sight unhindered by blinking and copious tears which would have been the case

had any irritation remained (Dr. Boyle, Ap. p. 122). As to the scarring which was found on the cornea of Sundwall's left eye, Dr. Boyle testified that it could have come either after or before the accident on the vessel. When he said it could have been caused by an injury in April, he was testifying in regard to the time element, not the actual cause (Dr. Boyle, Ap. p. 129). In regard to the cause, he testified that there are a variety of causes which produce ulcers the healing of which result in scarring (Dr. Boyle, Ap. pp. 130, 131). As to whether there was sufficient material in the oil to cause a burn and consequent scarring, Dr. Boyle testified that he made inquiries as to whether there was any acid or alkaline material in it which might burn the eye, and stated:

> "It didn't seem to have any of those things (material), any that I had experience with that caused scarring of the eye." (Dr. Boyle, Ap. p. 133)

The testimony of Dr. Bricca was, in the main, the same (Dr. Bricca, Ap. pp. 78, 79, 89).

In order to inform the court more exactly as to the testimony of the two doctors called by the respective parties in this case in regard to these pertinent points, excerpts have been selected and placed in Appendix "A."

For the reasons indicated above, it is respectfully submitted that the findings of the trial court and disposition of the case were correct and should be affirmed.

Dated at San Francisco, California, December 21, 1951.

Dorr, Cooper & Hays
Proctors for Respondent-Appellee.

(Appendix follows)

Appendix "A"

In comparing the irritation which Sundwall might have gotten from getting oil in his eye, Dr. Boyle testified as follows:

"Q. If it does have pain and injury, what is the physical effect on the patient?

A. Well, the patient has a sensation of pain, has tears and blinks the eye. It is the same sensation as a person getting a cinder in their eye, which is a well-known phenomenon.

Q. And ordinarily, Doctor, when you get a cinder in your eye, once the cinder is removed that is the effect of it?

A. The patient *is usually cured; ninety-nine times out of a hundred,* I should say.

Q. That is, if he got such an object as a cinder—how many times out of a hundred do you say, Doctor?

A. Ninety-nine times out of a hundred.

Q. Assuming that you had a fluid that was mildly irritating and within a comparatively short time after the mishap that caused the fluid to get in the eye, the eye was washed with luke warm water, and within an hour or two after that the eye was again washed, either with the assistance of another person or by the man himself, with an eye cup, what would you anticipate would be effect of removing any irritating cause?

A. Well, that would be considered good treatment, and *unless the fluid were something like lye or very strong acid or scalding material of some kind,* it should be sufficient to relieve the symptoms." (Emphasis supplied.) (Dr. Boyle, Ap. p. 121)

* * * * * * *

"Q. Now, Doctor, if there was serious irritation, irritation enough to cause an ulcer, from your experience over twenty years as a specialist, would you expect or would you consider it likely that a man could continue to work, which involved standing lookout on the head of the vessel and also standing a watch described as a wheel watch which involved looking at a compass—a lighted compass. Would you expect or anticipate if this were more than mildly irritating substance that a man would be able to do that sort of work?

A. Well, if he had two eyes, he might be able to do it; but in this case the man had just one eye, and if there was any severe irritation he would be blinking, tearing and difficulty doing any work that requires use of the eyes." (Dr. Boyle, Ap. p. 122)

In regard to the cause of scars of the cornea, Dr. Boyle testified as follows:

"Q. Of course; I want you to answer it any way that enables you to portray the facts of the thing.

A. In the office we see many people with ulcers and scars of the cornea in the private practice, and more than half of them have ulcers or scars the cause of which we do not know or we cannot discover either. * * *" (Dr. Boyle, Ap. p. 134)

Dr. Bricca testified in part as follows:

"Q. Would the introduction of any irritating substance possibly result in corneal opaqueness?

A. It is possible, yes." (Dr. Bricca, Ap. p. 78)

* * * * * * *

"Q. Will you say a corneal opaqueness following irritation is a common experience?

A. It depends on the severity of the burn and the resistance of the patient and the treatment. I mean,

there are any number of variables." (Dr. Bricca, Ap. p. 79)

* * * * * * *

"Q. So that I assume that had nothing to do with the condition of the cornea itself, did it?

A. I can't answer that in any thoroughness.

Q. The answer is you don't know; is that correct?

A. That is right." (Dr. Bricca, Ap. p. 83)

* * * * * * *

"Q. My question is really directed as to the first, from the mere impact, drops of paint or oil, whichever it was, wouldn't cause serious damage?

A. Not unless they were thrown with violent force.

Q. If it just flashed up in your eye?

A. The actual impact would probably cause no damage.

Q. If there is any damage to the eye at all it would be because—assuming that it wasn't thrown with a lot of force, it would be traceable to the irritation if the substance was an irritating substance?

A. Yes.

Q. And not knowing the exact nature of the paint or oil, whichever this substance was, you couldn't say whether it would be sufficiently irritating to cause serious damage resulting in an ulcer to the eye?

A. That is true; I can't make that statement." (Dr. Bricca, Ap. p. 89)

* * * * * * *

"Q. And in November, 1948, there was 20/80?

A. November 3, 1948, it states here—wait a moment; I will have to read these things. November 3, left eye, 20/80, yes.

Q. The normal eye is 20/20, or 10/10 as it is called, is it not?

A. Yes.

Q. Am I correct in believing from 20/40 to 20/80 it had gotten twice as bad?

A. No, no, it isn't a fraction; it is a statement of physical properties. It means that at twenty feet he sees what a normal person would see at forty feet. It isn't a percentage-wise thing. The actual vision decrease from 20/20 to 20/40—I believe it is not stated correctly; it is an approximation, it is around 20 or 25 per cent less vision.

Q. It had deteriorated at any rate?

A. He didn't see as much.

Q. In March of 1949, according to my notes here he had lens opacity in the left eye?

A. That is right.

Q. And opacity of course there means the same as it does in the cornea; it means you can't see through it?

A. That is right." (Dr. Bricca, Ap. pp. 93, 94)